



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL CASE NO. 10 OF 2015**

**STANCOM SACCO SOCIETY LIMITED.....PLAINTIFF**

**-VERSUS-**

**ALLIANCE ONE TOBACCO LIMITED.....DEFENDANT**

**JUDGMENT**

**Introduction:**

1. **Alliance One Tobacco Limited**, the Defendant herein, is a company registered in Kenya as a subsidiary of **Alliance One International, Inc.** Both the holding and subsidiary companies are engaged in the tobacco leaf merchant business with the Defendant operating in Kenya.
2. Sometimes in June 2015 the Defendant began scaling down its operations in Kenya and as result the employment of some of its employees was terminated on grounds of redundancy. Several other suits were filed in the **Employment and Labour Relations Court** as a result thereof.
3. During the Defendant's operations some of its employees became members of the **Stancom Sacco Society Limited**, the Plaintiff herein, which is a Co-operative Society duly registered within the Republic of Kenya with its offices in Suna-Migori where the said Defendant's employees variously benefitted from the Plaintiff's services.
4. This suit arose out of some of the dealings between the Plaintiff, the Defendant and the Defendant's employees.

**The suit**

5. By a Plaint dated 05/08/2015 and filed in Court on 06/08/2015 the Plaintiff averred of an agreement entered between itself and the Defendant where the Defendant would allow its employees to take loans from the Plaintiff and recover the said loan repayments from the Defendant's employees' salaries and or dues and remit the same to the Plaintiff. The Plaintiff further averred that the said agreement was to remain in force if the Defendant's employees remained in need of financial services from the Plaintiff and that the agreement would be terminated upon the parties taking accounts of their responsibilities to each other.
6. The Plaintiff further averred that it performed its part of the agreement by advancing loans to the Defendants' employees who became the Plaintiff's members and that by the time the Defendant was winding up its business in Kenya it had not remitted the sum of **Kshs. 46,833,318/58** to the Plaintiff despite demand thereof hence the claim together with interests and costs. Contemporaneously with the filing of the Plaint the Plaintiff filed a list of witnesses, a witness statement and some documents.
7. The Plaintiff then obtained and executed an *ex parte* judgment for the decretal sum by way of attaching some of the Defendant's properties. Resulting thereof the Defendant alleged that it had long before notice of the suit already transmitted what was due to the Plaintiff as instructed by its employees. The Defendant however paid the difference between the judgment sum and what it had already paid on a without prejudice basis and to forestall further attachment of its properties. A consent to set-aside the *ex parte* judgment was entered and the Defendant was given the liberty to file a defence.
8. The Defendant filed its Defence and Counter-claim dated 19/11/2015 on 20/11/2015 where it denied that there ever existed an agreement between itself and the Plaintiff either as alleged or otherwise and further denied that it was winding up its business in Kenya but that it was only scaling down its operations and had retained several of its employees to continue with its operations.
9. By way of counter-claim the Defendant averred that if its employees were members of the Plaintiff then that was on their own volition and not on its account and undertaking and as such no legal obligation arose for the Defendant to pay the Plaintiff the outstanding loan balances due from its former employees.

10. The Defendant further averred that it became aware of the *ex parte* judgment when the Plaintiff levied execution on its properties worth Kshs. 72,000,000/= and long after it had been instructed by its former employees, and so obliged, to pay the Plaintiff the sum of Kshs. 38,343,102/=. That, in a bid to arrest the execution and salvage its proclaimed properties the Defendant paid the balance between what was claimed in the suit and what it had already paid to the Plaintiff on the order of its former employees which translated to Kshs. 9,309,657/50 on a without prejudice basis but remained intent on challenging the default judgment and counter-claim for the sum which the Defendant so did.

11. From the record the Plaintiff did not file any Defence to the Counter-claim.

12. After the close of the pleadings each of the parties filed an interlocutory application. The Defendant applied for the preservation of the sum of Kshs. 9,309,657/50 which it paid to the Plaintiff aforesaid whereas the Plaintiff applied for judgment on admission. The Court issued the conservatory order pending the determination of the application or further orders of the Court. The application was however not dealt with thereafter. The Plaintiff's application was heard and dismissed.

13. Upon compliance with **Order 11 of the Civil Procedure Rules** the suit was set for hearing and a consent recorded that the parties and their witnesses do adopt their filed statements as their evidence-in-chief and be cross-examined and re-examined accordingly and that the filed documents be deemed to have been duly produced as exhibits. Each of the parties called only one of its representatives as witnesses. **Graham Kagali Angore** testified in his capacity as the Chairman of the Plaintiff whereas **Paulette Anne Elizabeth** testified in her capacity as the Regional Director of Alliance One International, Inc the holding company of the Defendant herein.

14. On closure of their respective cases parties filed written submissions and relied on various case law hence this judgment.

**Analysis and Determination: -**

15. Having carefully read and understood the contents of the Plaintiff, the Defence and Counter-claim, the witness statements, the evidence, the parties' submissions and the respective decisions tendered in support of each of the parties' cases, I shall deal with this matter under the following heads: -

- (a) **Whether there was a contract between the parties;**
- (b) **Whether the Defendant was served with Summons to Enter Appearance;**
- (c) **Whether judgment should be entered as prayed in the Plaintiff;**
- (d) **Whether judgment should be entered as prayed in the Counter-claim;**

16. I will deal with each issue at a time.

**(a) Whether there was a contract between the parties: -**

17. It is the Plaintiff's case that there existed an agreement between the parties. According to the Plaintiff's witness the agreement was not in writing but could be inferred from the documents filed in Court. In cross-examination the Plaintiff's witness said in part that '*... The Defendant used to assist us to determine how much we could advance to the employees. The Defendant would deduct the repayments from their salaries to satisfy the loans. There were two relationships. One was between the employee and the Sacco [Plaintiff] and the other was between the employee and the Defendant [the employer]. I confirm that any deduction of the salary was to be sanctioned by the employees.....The Sacco appraises the Loan Application Form. The Defendant does not sign the Loan Application Form... The claim is for money to be deducted from the Defendant's employees. There are express authorizations in the list of documents. I have now confirmed that those authorizations were not filed in this suit. All members had guarantors. We pursued the guarantors for recovery. I have nothing to prove that... There were four ways of recovery. The only way we could recover from the Defendant was by way of the terminal dues, but the employees must have expressly authorized the Defendant to pay us...*'

18. In re-examination the Plaintiff's witness reiterated that there was a mutual understanding between the Plaintiff and the Defendant and that the agreement was implied. He also stated that the Defendant used to confirm the maximum amount of money the Plaintiff could loan the Defendant's employees by strictly observing the statutory rule that no employee's loan deductions should exceed two-thirds of the salary before any loan was approved.

19. The Plaintiff amplified the foregoing in its submissions and urged this Court to find that indeed an implied agreement existed between the Plaintiff and the Defendant.

20. To the Defendant, its former employees voluntarily and without its consent joined the membership of the Plaintiff and benefitted from the services including loans. That, the Defendant being not a party to the agreement between its former employees and the Plaintiff was only instructed by its individual former employees to deduct some of their monies and remit to the Plaintiff. The Defendant produced a bundle of letters by its former individual employees authorizing the Defendant to deduct specific amounts of the respective employee's money then held by the Defendant and remit it to the Plaintiff. The Defendant contends that the said authorizations amounted to Kshs. 38,343,102/= which amount the Defendant duly remitted to the Plaintiff.

21. The Defendant submitted that the foregoing arrangement did not yield into any agreement between itself and the Plaintiff.

22. Settled, it is, that an agreement may be express or implied. In this case there is no doubt that there was no express agreement between the

parties. The Plaintiff then endeavored to demonstrate that from the conduct of the parties it was clear that an implied agreement was proved. The Plaintiff's witness however admitted there were no direct dealings between the parties but between either the Plaintiff and the Defendant's employees or between the Defendant and its employees.

23. The relationship between the Defendant and its employees, on one hand, rested on the express authority given by the employees to the Defendant to deduct some of their money then held by the Defendant and remit the same to the Plaintiff. The Plaintiff's witness confirmed as much. The Defendant produced the said authorizations as exhibits. On the other hand, the relationship between the Plaintiff and the Defendant's employees was that the Defendant's employees would join the Plaintiff membership and benefit from its products including loans. Whereas the Plaintiff alleged that the Defendant had to initially confirm to the Plaintiff how much its employees could be advanced before any loan approval, that crucial issue was not proved. Instead, the Plaintiff's witness confirmed that the loan appraisal was solely undertaken by the Plaintiff and that the Defendant did not even sign any part of the Loan Application Forms. I have perused the said Loan Forms and confirmed that position.

24. Be that as it may, what is the legal standing on this issue? The Court of Appeal in the case of **William Muthee Muthami vs. Bank of Baroda (2014) eKLR** observed that: -

*'In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.'*

25. The Learned authors, **Cheshire, Foot and Formstons**, in their book, **The Law of Contract**, (14<sup>th</sup> Edition) at pages 34 and 35 have stated that: -

*'The first task of the plaintiff is to prove the presence of a definite offer made.... Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offer to accept that offer.'*

26. In the case of **Rose and Frank Co. vs. J R Crompton & Bros Ltd (1923) 2 KB 293**, **Atkin, LJ** stated that: -

*'To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.'*

27. As to implied contracts, **Lord Clarke** in the case of **RTS Flexible Systems Ltd vs. Molkerei Alois Muller GmbH (2010) UKSC 14** stated that: -

*'...The general principles are not in doubt. Whether there was a binding contract between the parties and of so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.'*

28. In a like-discussion in the case of **Lamb vs. Evans (1893) 1 Ch 218** the Court stated that: -

*'.....What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.....'*

29. The circumstances in which a contract might be implied were aptly observed in the case of **The Aramis (1989) 1 Lloyds Rep 213** as follows: -

*'....As the question whether or not any such contract is to implied is one of fact, its answer must depend upon the circumstances of each particular case – and also agree that no such contract should be implied on the facts of an given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist....'*

*.....I do not think it is enough for the party seeking the implication of a contract to obtain 'it might' as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.'* (emphasis added).

30. Closer home the Court of Appeal in the case of **Ali Abdi Mohamed vs. Kenya Shell & Company Limited (2017) eKLR** stated that: -

***'11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded....'***

31. The foregone analysis crystalizes the position in this case as follows: that; there were express contracts between the Plaintiff and the Defendant's employees whose terms were contained in the loan agreements, that; there were as well express contracts between the Defendant and its employees as evidenced by the letters authorizing the Defendant to deduct some of its employees' money and remit it to the Plaintiff, and that; there was no legally binding arrangement between the Plaintiff and Defendant that can be deduced to have amounted to an implied contract.

32. There is no evidence that the Plaintiff and the Defendant ever entered into any discussions or negotiations on the matter or at all. There is equally no evidence that the Defendant took any part in the loan appraisals or approvals before the loans were advanced to the Defendant's employees. The Plaintiff witness further confirmed that there were indeed no dealings between the parties in this suit save what the Defendant was instructed to remit to the Plaintiff by its employees. The act of the Defendant complying with its employees' instructions cannot be said to have amounted to a contract between the Defendant and the Plaintiff since the Defendant would have acted exactly as it did in the absence of a contract. There was therefore no meeting of minds between the parties in this suit hence no contract at all.

33. The first issue is hence answered in the negative.

**(b) Whether the Defendant was served with Summons to Enter Appearance: -**

34. The main reason for disallowing the Notice of Motion dated 09/02/2016 was on account of the then unsettled issue of the service of summons. This Court expressed its inability to settle the issue in paragraphs 28 and 29 of its ruling delivered on 12/05/2016 and hoped that the issue would be ventured into as the matter progresses. That seems not to have happened.

35. The issue of service of summons was indeed hotly contested in this suit right from the Defence and Counter claim into the Notice of Motion dated 13/11/2015. The Plaintiff however did not file any Reply to Defence and/or a Defence to Counter claim. The issue was not even settled by the consent that set-aside the *ex parte* judgment which paved way to the filing of the Defence and Counter claim by the Defendant. I have perused the Notice of Motion dated 13/11/2015 and noted that it sought restraining orders against disbursement of Kshs. 9,309,657/50 on grounds including the alleged non-service of summons upon the Defendant. The application was however not heard or determined after the issuance of some interim orders.

36. That being so, the issue of service of summons became an issue for determination since it had a direct bearing on the suit. Pursuant to **Section 107 of the Evidence Act, Cap. 80** of the Laws of Kenya the Plaintiff was under a duty to prove the allegation more so that the *ex parte* judgment had been set aside and the issue of service of summons specifically denied in the Defence and Counter claim. The Plaintiff however did not address itself on the issue at all. The Plaintiff did not even call the Process Server who allegedly effected service of the summons and whose Affidavit of Service was already on record to testify neither were reasons given for the non-attendance.

37. The upshot is that the Plaintiff did not prove when it served the Summons to enter appearance and a copy of the Plaintiff upon the Defendant. As such the Defendant's position that it was never served with the Summons to enter appearance and a copy of the Plaintiff and that it only came to know of the pendency of the suit upon the proclamation of its properties and long after it had paid Kshs. 38,343,102/= to the Plaintiff on instructions of its former employees on 07/10/2015 carries the day. The issue is hence answered in the negative.

**(c) Whether judgment should be entered as prayed in the Plaintiff: -**

38. The Plaintiff's claim was for Kshs. 46,833,813/58 with costs and interests. That the Defendant paid Kshs. 38,343,102/= to the Plaintiff is variously admitted by the Plaintiff. As to the sum of Kshs. 9,309,657/50, the Defendant stated that it paid the Plaintiff to avoid the execution of the *ex parte* judgment but on a without prejudice basis. That was in the Defence and Counter claim which the Plaintiff opted not to file any response to.

39. As the Plaintiff did not formally deny the payment as alleged by the Defendant, then the issue was deemed admitted and was not for determination. The Plaintiff's submission that the sum of Kshs. 9,309,657/50 was not paid to the Plaintiff does not therefore hold since any submission not made in support to a pleading is for rejection. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings: -

***"[52] Further, the Court went on and observed that: -***

***"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."***

40. But that aside, there is ample evidence on record on how the sum was demanded and eventually paid to the Plaintiff's Advocates. To that end, the Defendant produced the Plaintiff's copy of a letter dated 29/10/2015 demanding the said sum, a copy of its Payment Voucher authorizing the payment and a copy of the Defendant's Bankers RTGS Report in confirmation of the payment to the Plaintiff's Advocates.

41. According to the Defendant, by the time its properties were proclaimed it had long discharged its duty and paid the sum of Kshs. 38,343,102/= to the Plaintiff as directed by its employees and that it only paid the sum of Kshs. 9,309,657/50 under protest to salvage its

proclaimed which was worth around Kshs. 72,000,000/=.

42. The Plaintiff did not particularize its claim neither did it adduce any evidence to prove that the sum claimed for was due and payable. The claim was a liquidated one and it is settled in law that such claims must be clearly pleaded and specifically proved. Citing its inability to prove the claim the Plaintiff's witness stated that '*.....The claim is for money to be deducted from the Defendant's employees. There are express authorizations in the list of documents. I have now confirmed that those authorizations were not filed in this suit.....*'

43. With such a state of affairs the Plaintiff is lucky that the Defendant had made a prior payment and even filed copies of its employees' letters authorizing it to pay the Plaintiff otherwise the whole sum claimed in the Plaintiff would not have been recoverable for want of proof. I hence find and hold that the sum of Kshs. 9,309,657/50 was not proved to be payable to the Plaintiff. Consequently, the Plaintiff's claim is for rejection and is hereby dismissed.

**(d) Whether judgment should be entered as prayed in the Counter-claim:**

44. This issue has been answered in the foregone analysis. Since the claim of Kshs. 9,309,657/50 is as well a liquidated one and no defence was filed thereto and further to the evidence on record on the payment thereof to the Plaintiff's Advocates, this Court is satisfied that sum is recoverable by the Defendant.

45. The Defendant has therefore proved its entitled to the sum of Kshs. 9,309,657/50 as prayed for in the Counter-claim.

**(e) Conclusion: -**

46. Having considered all the issues raised in this matter and having made the various findings above, this Court hereby makes the following final orders: -

**a) The Plaintiff's suit be and is hereby dismissed accordingly;**

**b) Judgment is hereby entered for the Defendant against the Plaintiff in the sum of Kshs. 9,309,657/50 with interest at Court from the date of filing of the Counter-claim;**

**c) The Plaintiff shall bear the costs of the Plaintiff's suit as well as the costs of the Counter-claim;**

47. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of February 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Nyauke** Counsel for the Plaintiff.

**Mr. Ondati** and **Mr. Kouko** Counsels for the Defendant.

**Ms. Nyauke** - Court Assistant